

This Opinion is Not a
Precedent of the TTAB

Mailed: March 9, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re JHR Entertainment, LLC

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Serial No. 88286556

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Jennifer Mott of Aspey Watkins & Diesel, PLLC for JHR Entertainment, LLC.

K. Margaret Le, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

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Before Cataldo, Goodman, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

JHR Entertainment, LLC (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark MUSICAL TUSHIES (“MUSICAL” disclaimed) for “Greeting cards; musical greeting cards,” in International Class 16.¹

¹ Application Serial No. 88286556 was filed on February 1, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. The application originally also covered services in International Class 42, but was divided on appeal into a “parent” application Serial No. 88286556 covering the Class 16 goods, which is before us on this appeal, and a “child” application Serial No. 88979062, which has been published for opposition and allowed.

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the goods identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.² We reverse the refusal to register.

I. **Record on Appeal**³

The record on appeal includes dictionary definitions of the words “tushy,” “tushie,” and “musical,”⁴ and third-party Internet webpages displaying paper or electronic musical greeting cards,⁵ “Funny Butt” greeting cards,⁶ and greeting cards that show human or animal buttocks.⁷

² Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

³ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁴ April 23, 2019 Office Action at TSDR 2-3 (Dictionary.com).

⁵ *Id.* at TSDR 4-7; November 13, 2019 Final Office Action at TSDR 2-4; May 15, 2020 Denial of Request for Reconsideration at TSDR 2-5.

⁶ November 13, 2019 Final Office Action at TSDR 5.

⁷ May 15, 2020 Denial of Request for Reconsideration at TSDR 6-8.

II. Analysis of Refusal

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).⁸

“A mark is ‘merely descriptive’ within the meaning of Section 2(e)(1) ‘if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.’” *In re Omniome, Inc.*, 2020 USPQ2d 3222, *3 (TTAB 2020) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). To be merely descriptive, a mark must forthwith convey such information with a “degree of particularity.” *The Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2008) (citing *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s, Inc.*, 15 USPQ 2d 1750, 1751 (TTAB 1990), *aff’d*, 90-1495 (Fed. Cir. Feb. 13, 1991)). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Omniome*, 2020 USPQ2d 3222 at *3 (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

The descriptiveness of a mark in an intent-to-use application must be determined by the goods or services identified in the application. *See Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *In re*

⁸ Applicant does not claim that its proposed mark has acquired distinctiveness.

Vehicle Identification Network, Inc., 32 USPQ2d 1542 (TTAB 1994). Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use,’” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)),⁹ and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of two words, MUSICAL TUSHIES. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering

⁹ Registration may be refused if the proposed mark is merely descriptive of either of the goods identified in the application. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

[a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the two words in the proposed mark are individually descriptive of the identified goods, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites,

publications and use in labels, packages, or in advertising material directed to the goods.” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). “The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (citing *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994)).

The Examining Attorney “contends that both the individual components and the composite result of applicant’s mark are descriptive of applicant’s goods and do not create a unique, incongruous, or non-descriptive meaning in relation to the goods.” 12 TTABVUE 2. She argues that MUSICAL is descriptive because Applicant’s identification of goods covers “musical greeting cards,” *id.* at 2-3, which the record shows is “a well-known genus of greeting cards” in both paper and electronic forms. *Id.* at 3. She argues that TUSHIES “refers to the human part also known, inter alia, as butt or buttocks,” and that “TUSHIES describes the graphic images which potentially can or would appear on applicant’s greeting cards and musical greeting cards,” which she claims “describes a significant feature of the goods.” *Id.* She cites Internet webpages that display or refer to this part of the human body as it appears on greeting cards. We reproduce a few below:



Funny Dog in Shade Birthday Card

\$3.65

10



Funny Birthday: Joe the Plumber Card

\$3.65

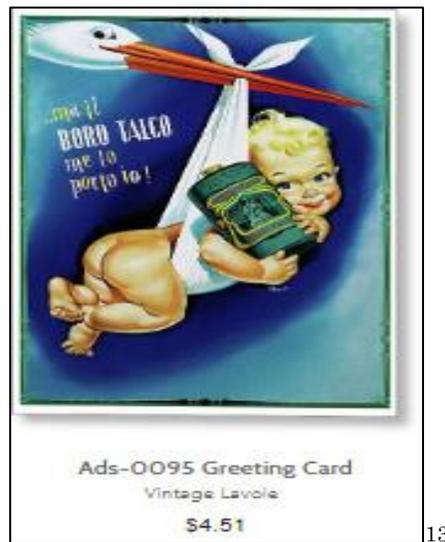
11

¹⁰ November 13, 2019 Office Action at TSDR 5. This card and others are displayed on a Zazzle page captioned “Funny Butt Cards.” Most of the cards displayed show animals, not humans.

¹¹ *Id.*



The website of fineartamerica contains a page entitled “Tush Greeting Cards,” which displays numerous greeting cards displaying photographs and drawings of nudes, which we will not reproduce here in the interest of modesty, as well as two more humorous cartoon cards, one of which we reproduce below:



¹² May 15, 2020 Denial of Request for Reconsideration at TSDR 6. This card and others are displayed on a Cafe Press page entitled “Tush Greeting Cards.”

¹³ *Id.* at TSDR 7.

The Examining Attorney also made of record a page showing the results of a Google search for images of “greeting cards with butts,” which displays a number of cards, including the two shown below:



¹⁴ *Id.* at TSDR 8. All highlighting in the record was supplied by the Examining Attorney.

¹⁵ *Id.*

With respect to the proposed mark MUSICAL TUSHIES as a whole, the Examining Attorney argues that “the cards are definitely MUSICAL” and that “nothing in the identification of the goods prevents the cards from featuring images of TUSHIES -- defined as buttocks or the synonyms of butts and asses.” 12 TTABVue 4. She further argues that “the mark MUSICAL TUSHIES identifies features of the applicant’s goods and is therefore descriptive even if the cards feature some additional characteristics aside from music and images of tushies,” *id.*, because

[w]hen a consumer encounters the mark MUSICAL TUSHIES as the source for musical greeting cards which feature buttock or tushies, the consumer would immediately understand that the mark refers to these significant features of the cards--that they feature the image of butts/buttocks or tushies and that they also feature music. The mark as a whole is descriptive within the meaning of Section 2(e)(1) of the Trademark Act.

Id.

The Examining Attorney argues that the mark as a whole is not incongruous and has no non-descriptive meaning. She contends that because “a tushie that is musical or a ‘musical tushie’ is not a known expression or a particular item in the marketplace, the public would revert to the standard meaning of these two terms,” and that “[w]hen viewed in relation to the musical greeting cards which also feature images of tushies, the mark would immediately and directly convey information about the goods--rendering the mark descriptive,” *id.* at 5, but that even “assuming arguendo that ‘musical tushies’ may be seen as tushies which some how [sic] produce music,” the mark would still be descriptive because “[e]ven then, the component parts describe features of the goods--that is, the cards feature tushies which produce music.

In such case, the significant feature of the goods is a graphical depiction of a musical tushie.” *Id.*

Applicant argues that its proposed mark must be considered as a whole and that the Examining Attorney “assessed each term of the mark individually.” 8 TTABVue 7. Applicant “does not contest that the term ‘musical’ without more may be merely descriptive of greeting cards that play music,” *id.* (emphasis in original), but argues that TUSHIES is not similarly descriptive. According to Applicant, “the evidence offered showing ‘tushies’ is descriptive uses the search term for the synonym ‘butt,’” *id.*, and “[w]hile ‘tushies’ and ‘butt’ may both refer to the buttocks, the terms have a different connotation which cannot be completely disregarded in the analysis. This scant evidence that ‘tushies’ is descriptive of greeting cards does not satisfy the Examining Attorney’s initial burden of proof.” *Id.*

Applicant also argues that the “combination of the terms creates a new, unique commercial impression.” *Id.* at 8. Applicant notes that “[w]hen the terms of the mark are combined, the term ‘musical’ becomes an adjective for ‘tushies’” and no longer describes a greeting card per se, *id.* at 9, and that a “consumer must then assess what ‘musical tushies’ are.” *Id.* Applicant posits the following questions that it claims consumers would need to ask to determine the precise features of the musical greeting cards sold under the proposed MUSICAL TUSHIES mark: “Are they anthropomorphized body parts creating actual music by playing instruments? Is the ‘music’ emanating from the tushies a humorous reference for flatulence? Because the

terms are not commonly heard together, could ‘tushies’ be referring to something other than buttocks in this context?” *Id.*

According to Applicant, MUSICAL TUSHIES is suggestive, not merely descriptive, because a “consumer must first consider what are ‘musical tushies’ before the consumer can contemplate how that relates to a greeting card.” *Id.* at 10. Applicant posits the following additional questions that it claims consumers would need to ask to determine the features of the musical greeting cards sold under the proposed MUSICAL TUSHIES mark: “What is ‘musical’ – the tushies or the card? Does the card feature an image of tushies that are musical or does the card itself play music? Is [it] the graphical depiction of human buttocks which may be explicit or the furry backends of bunnies?” *Id.* Applicant also argues that there is no evidence of third-party use of MUSICAL TUSHIES to describe greeting cards in general and musical greeting cards in particular. *Id.*

Finally, Applicant takes issue with the Examining Attorney’s claim that because the identified goods could contain both music and tushies, the mark as a whole is merely descriptive, arguing that “the rule cannot be that features of the description of goods get to be assumed without evidentiary support” because “[i]f that were true, then every single noun or adjective would merely describe greeting cards because cards could theoretically feature an infinite number of images, content, etc.” *Id.* at 11-12. Applicant concludes that

[i]f there is no per se rule, then consideration must be given to whether a particular term (or combined term) may feasibly be recognized as describing cards. As noted above, Applicant, through a disclaimer of “musical” acknowledged

that “musical” may be a more common feature of greeting cards. The same cannot be said for “tushies.” “Tushies” is not a significant function, attribute, or property of greeting cards and “musical tushies” even less so.

Id. at 12.

As discussed above, we must analyze the descriptiveness of the individual words MUSICAL and TUSHIES in the proposed mark, and if each word is merely descriptive, we must then consider whether their combination yields a mark that is itself merely descriptive.

The record clearly shows that the disclaimed word MUSICAL in the proposed mark is generic for the “musical greeting cards” identified in the application, because it names the particular genus of musical greeting cards that is listed in the identification, and descriptive of the goods more broadly identified as “greeting cards,” because it describes a feature of such goods, namely, that they play music. There are multiple examples of the use of “musical” to identify the genus or to describe the feature.¹⁶

Whether the word TUSHIES is also merely descriptive of the goods is a much more difficult question. The record contains two uses of “Tush” on greeting cards themselves,¹⁷ and uses of “Tush Tush Greeting Cards” and “Tush Greeting Cards” in the title of webpages displaying cards depicting or referring to the buttocks,¹⁸ but no

¹⁶ April 23, 2019 Office Action at 4-7; November 13, 2019 Final Office Action at TSDR 2-4; May 15, 2020 Denial of Request for Reconsideration at TSDR 2-5.

¹⁷ May 15, 2020 Denial of Request for Reconsideration at TSDR 6.

¹⁸ *Id.* at TSDR 6-7. As noted above, two of the cards on the Cafe Press page display the word “Tush.” *Id.* at TSDR 6. The additional verbal references to the buttocks on that page involve other words such as “ass” or “asses,” “butt” or “butts,” “cheeks,” and “bum.” *Id.* One card on

uses of “Tushies.” There is no showing that the plural word “Tushies” names a genus of, or describes a feature of, greeting cards, namely, that they display or refer to the human buttocks, and there is an underwhelming showing that the singular word “Tush” commonly does so. We thus find insufficient evidentiary support for the Examining Attorney’s speculative assertion that the term TUSHIES in Applicant’s proposed MUSICAL TUSHIES mark merely describes the identified goods. Even assuming, however, that the plural word “Tushies” (as opposed to the singular word “Tush”) describes that feature of greeting cards when “Tushies” is considered separately, we find that the whole of the proposed mark MUSICAL TUSHIES is greater than the sum of its one clearly descriptive and one arguably descriptive parts.

As Applicant correctly notes, the word MUSICAL in Applicant’s mark modifies the word TUSHIES, which begs the fundamental question: What are “musical tushies” in the context of musical and other greeting cards?¹⁹ We are not persuaded by the Examining Attorney that the answer to that question is greeting cards that “feature the image of butts/buttocks or tushies and . . . also feature music,” 12 TTABVue 4, or greeting “cards featur[ing] tushies which produce music.” *Id.* at 5. On this record,²⁰ it is not clear to us what the answer is, and that uncertainty is

the [fineartamerica](#) webpage showing a top view of a spider is captioned “Spider Tush Greeting Card.” *Id.* at TSDR 7.

¹⁹ Applicant’s lists of more specific questions illustrate the vagueness of the meaning of the mark as a whole in the context of the goods.

²⁰ Section 1102.01 of the Trademark Manual of Examining Procedure (“TMEP”) (Oct. 2018) instructs examining attorneys that in examining an intent-to-use application, they “may require that the applicant provide literature or an explanation concerning the intended manner of use of the mark, or the meaning of the mark in relation to the goods,” and may resort to evidence of how the mark is used from sources such as the applicant’s website even

inconsistent with a finding of mere descriptiveness because a merely descriptive term not only immediately conveys information about a feature or some other attribute of the goods, but does so with a “degree of particularity.” *Goodyear Tire & Rubber Co.*, 70 USPQ2d at 1069; *TMS Corp.*, 200 USPQ at 59; *Entenmann’s*, 15 USPQ 2d at 1751. At a minimum, the sparse record here admits of reasonable doubt as to the mere descriptiveness of the proposed mark MUSICAL TUSHIES, and we must “resolve reasonable doubt in favor of the applicant, in accordance with practice and precedent,” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987), and “pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established.” *Stroh Brewery*, 34 USPQ2d at 1797 (citation omitted).

Decision: The refusal to register is reversed.

though the applicant is not required to submit a specimen of use during prosecution. We have no such evidence from such sources of the manner of use or intended use of the mark and thus must evaluate whether the mark is merely descriptive solely on the basis of the mark and goods as shown and described within the four corners of the application.